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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re R.H. Nagel Distributing Company, Inc.

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Serial No. 75/813,722

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Alana T. Bergman of Kinney & Lange for R.H. Nagel  
Distributing Company, Inc.

Naakwama Ankrah, Trademark Examining Attorney, Law Office  
101 (Jerry Price, Managing Attorney).

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Before Cissel, Hairston and Walters, Administrative  
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

R.H. Nagel Distributing Company, Inc. has filed an  
application to register the mark LEGACY on the Principal  
Register for "cremation urns."<sup>1</sup>

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<sup>1</sup> Serial No. 75/813,722, in International Class 21, filed October 4,  
1999, based on use in commerce, alleging first use and use in commerce  
as of May 1, 1992.

The Trademark Examining Attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark THE LEGACY, previously registered for "burial caskets,"<sup>2</sup> that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA

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<sup>2</sup> Registration No. 1,795,038 issued September 28, 1993, to Marsellus Casket Company Corporation, in International Class 20. [Sections 8 and 15 accepted and acknowledged, respectively.]

1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

The Examining Attorney contends that the marks are "virtually identical"; that the goods are closely related "because the goods can be found in the same trade channels"; that the evidence establishes that "the same entities that sell cremation urns also sell burial caskets under the same trademark"; and that neither the sophistication of the purchasers nor a lack of actual confusion is dispositive. In support of this position, the Examining Attorney submitted the results of a search using the Google search engine, excerpts from two Internet web sites and copies of several third-party registrations.<sup>3</sup>

Applicant contends that "cremation urns and burial caskets are completely different products with completely different uses"; that the initial purchasers of these products are "professional funeral home directors who are

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<sup>3</sup> While Internet search engine results may be probative of the use of a particular term if sufficient context is given, a search engine printout is insufficient to establish that goods or services emanate from a single source under the same trademark. However, excerpts from individual Internet web sites may show such a connection. But in this case, the excerpts submitted are for retail funeral products and do not establish that the same trademarks identify the urns and caskets sold therein. For the same reason, third-party registrations for retail funerary services are not probative of this question; although this evidence is probative of the existence of retail funeral products services. We have considered the six registrations for marks that

highly sophisticated"; and that the marks have coexisted on their respective products "for nearly ten years with no known confusion." Applicant submitted no evidence.

There is no question that applicant's mark and the registered mark are substantially the same, which applicant does not dispute. The additional word "the" in the registered mark does not distinguish it from applicant's mark.

Turning to consider the goods involved in this case, we note that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even competitive in order to support a

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identify both cremation urns and burial caskets to be probative of the question of the relationship of the goods.

finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

Applicant states that urns and caskets are marketed initially to funeral home personnel. However, the Internet web sites and several of the third-party registrations submitted by the Examining Attorney indicate retail sales of these products. Such sales are not limited by the evidence or by implication to funeral professionals, but would appear to be available to the general consuming public. In fact, one Internet retail service is advertised as offering a way to lower funeral and burial costs. Thus, while funeral professionals represent one class of purchasers, who are presumably knowledgeable purchasers, we must consider the complete spectrum of purchasers.

Applicant argues that the products are mutually exclusive, because someone choosing cremation would not be purchasing a casket; and that the products are vastly different in price. There is no evidence in the record about the cost of caskets and urns, so we cannot draw any conclusions in this regard. Similarly, applicant's statements about the segregated markets for these products is based herein on conjecture. The Internet web site of record contains marketing that appears to be aimed at consumers who are planning ahead. It is reasonable that, for some consumers, a decision as to whether to choose cremation or burial has not been made, and that a number of factors, including price, could be part of deciding how their remains will be handled upon their death. Thus, a consumer could be considering both burial caskets and cremation urns as part of making that decision. We note, also, that one of the third-party registrations includes "crematable caskets" as one of its listed products, which indicates that some consumers may purchase both caskets and urns.

With regard to the third-party registrations submitted by the Examining Attorney, we note that although third-party registrations which cover a number of differing goods and/or services, and which are based

on use in commerce, are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, such registrations nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988). In this case, the record shows six registrations that include both burial caskets and cremation urns in the identification of goods for a single mark. While this is not a large number, it is sufficient in view of the record in this case, to support our conclusion that burial caskets and cremation urns are related products, which may be sold to the same classes of purchasers through the same channels of trade.

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, LEGACY, and registrant's mark, THE LEGACY, their contemporaneous use on the related goods involved in this case is likely to cause confusion as to the source or sponsorship of such goods.

With regard to applicant's assertion that it is aware of no instances of actual confusion occurring as a

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result of the contemporaneous use of the marks of applicant and registrant for almost ten years, we note that, while a factor to be considered, the absence or presence of actual confusion is of little probative value where we have little evidence pertaining to the nature and extent of the use by applicant and registrant. Moreover, the test under Section 2(d) is not actual confusion but likelihood of confusion. See, *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-1027 (TTAB 1984); and *In re General Motors Corp.*, 23 USPQ2d 1465, 1470-1471.

*Decision:* The refusal under Section 2(d) of the Act is affirmed.